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Badan Pengurusan Tiara Duta v Timeout Resources Sdn Bhd

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-1506–07 OF 2013

B

MOHAMAD ARIFF YUSOF, MAH WENG KWAI AND DAVID WONG JJCA

29 APRIL 2014

C

Land Law — Joint management body ('JMB') — Lease of common property in condominium complex — Whether joint management body ('JMB') had power under the Building and Common Property (Maintenance and Management) Act 2007 ('Act') to lease out common property — Whether benefits accruing to residents and members of JMB from leasing out of common property was doing by JMB of something 'reasonably necessary for the performance of its duties under the Act' — Section 8(2)(g) of the Act — Whether JMB's termination of agreement to lease wrongful as 'lessee' had not committed any breach — Whether agreement to lease impliedly obliged JMB to give 'lessee' supporting letter to enable it to obtain business license to operate at common property

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The main issue that arose for determination in the instant appeal was whether a condominium complex's joint management body ('JMB'), incorporated under the Building and Common Property (Maintenance and Management) Act 2007 ('the Act') had power under the Act to lease out the common property to a third party. In the instant case, the JMB had entered into an agreement ('the agreement') with the respondent for the latter to lease the condominium complex's clubhouse, restaurant and car parks ('the premises') on a long-term basis. The new management of the appellant contended that its previous management not only did not have the appellant's authority to enter into the agreement but that the agreement itself was ultra vires the powers given to a JMB under s 8(2) of the Act and were accordingly null and void. The agreement was not registered as a lease under the National Land Code. Pursuant to the agreement, the respondent was to operate a food court and restaurant and offer event management services and it was contractually agreed that the restaurant would be open both to residents of the condominium as well as members of the public. Shortly after taking possession of the premises and carrying out renovations, the respondent needed to have its business licence with the local authority renewed for the forthcoming year for which a letter of support from the appellant was required. The appellant, which by this time had undergone a change in management which was opposed to the leasing of the premises, refused to give the supporting letter saying that the agreement did not oblige it to do so. Consequently, the respondent was unable to secure a licence to operate its business at the premises and it therefore stopped paying rental. The respondent sued the appellant in the High Court for damages for

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breach of the agreement and sought an order of specific performance to compel the appellant to issue it the supporting letter. In turn, the appellant, which had issued the respondent a notice of termination of the agreement, counterclaimed for vacant possession of the premises and for damages premised on the respondent's failure to pay rent. The High Court allowed the respondent's claims for damages and for specific performance and dismissed the counterclaim. The appellant appealed against the whole of the decision but at the appeal hearing did not pursue with its appeal against the dismissal of its counterclaim.

Held, dismissing the whole of the appeal:

(1) The absence of a specific provision spelling out expressly the power to sell, lease or rent out common property in s 8(2) of the Act did not necessarily mean a JMB did not have the power to do so. The power did not have to be express and it could be implied that the leasing out of common property by a JMB could come within the ambit of s 8(2)(g) of the Act. As there was a general provision in s 8(2)(g) ('to do all things reasonably necessary for the performance of its duties under the Act'), the court saw no reason or basis to declare the agreement to lease in the present case to be null and void for being ultra vires the Act. Recognising the power to sell, rent or lease common property was to enable or facilitate a JMB in performing its duties by doing things which were reasonably necessary. The implied power promoted business efficacy in the maintenance and management of the common property (see paras 28 & 32).

(2) The court did not agree with the appellant that the operation of s 8(2)(g) related only to matters in the performance of duties by a JMB under s 8(2)(a) to (i). That would be too strict and rigid an interpretation. If, as was provided in s 8(2)(d), a JMB could purchase, hire or acquire property, the court saw no reason why a JMB could not do the converse provided, of course, the sole objective was the benefit of the residents and members of the JMB. The appellant as the JMB would still be able to manage and maintain the premises through the agreement (see paras 29 & 35).

(3) One of the main duties of the JMB under s 8(1) of the Act was to look after the welfare of its members in their enjoyment of the common property. Under s 8(1)(i), the appellant was generally authorised to do such other things as were expedient or necessary for the proper maintenance and management of the buildings. Even with the lease of the premises granted to the respondent, members of the appellant were able to enjoy that part of the common property. The members not only had the benefit of the use of the restaurant but the rentals from the lease could be applied to reduce the maintenance and management charges

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payable by members of the appellant. The leasing out of the premises was thus the doing by the JMB of something reasonably necessary for the performance of its duties under the Act (see para 31).

(4) Although the agreement in the instant case was not registered under the National Land Code and therefore was void as a lease, it was still good and valid as an agreement for a lease and was enforceable in equity by a decree of specific performance (see para 24(d)(iii).

(5) The appellant's notice of termination and the claim for vacant possession in the said notice was not a proper and valid notice of termination of the agreement. There did not seem to have been any proven breach/breaches committed by the respondent right up to 31 December 2012. The respondent had stopped paying rental thereafter because it was unable to renew its business licence for 2013 by reason of the appellant's failure to furnish the letter of support (see para 24(c)(iii)).

(6) The appellant was impliedly obliged under the agreement to have given the letter of support to the respondent to enable it to obtain its business licence for 2013. Parties to an agreement had to do such acts as were necessary to preserve the integrity of the agreement and to ensure its due performance. There was no reason for the appellant to refrain from giving the letter of support if not for the singular intention of preventing the respondent from carrying out its business at the premises in 2013 (see para 24(b)(ii)(iv)).

(7) The appellant's former chairman (SP2) and secretary (SP3) were fully authorised to deal with the respondent and to have entered into the agreement on the appellant's behalf. The internal management rule also applied in favour of the respondent, which was an outsider, and it was entitled to presume that all things were rightly done within the appellant as the respondent had acted in good faith without notice of any challenge to SP2's and SP3's authority (see paras 24(a)(iii)(f), (v)).

[Bahasa Malaysia summary

Isu utama yang timbul untuk ditentukan dalam rayuan ini adalah sama ada *joint management body* ('JMB') kompleks kondominium, yang ditubuhkan di bawah Akta Bangunan dan Hartanah Bersama (Penyelenggaraan dan Pengurusan) 2007 ('Akta tersebut') mempunyai kuasa di bawah Akta tersebut untuk memajak hartanah bersama kepada pihak ketiga. Dalam kes ini, JMB telah memasuki perjanjian ('perjanjian tersebut') dengan responden untuk responden memajak rumah kelab, restoran dan tempat parker kereta kompleks kondominium ('premis tersebut') bagi tempoh jangka panjang. Pengurusan baru perayu berhujah bahawa pengurusan sebelumnya bukan sahaja tidak mempunyai kuasa perayu untuk memasuki perjanjian tersebut tetapi perjanjian tersebut sendiri adalah diluar bidang kuasa-kuasa yang diberikan kepada JMB di bawah s 8(2) Akta tersebut dan sewajarnya terbatal dan tidak

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sah. Perjanjian tersebut tidak didaftarkan sebagai pajakan di bawah Kanun Tanah Negara. Menurut perjanjian tersebut, responden adalah untuk menjalankan operasi medan makan dan restoran dan menawarkan perkhidmatan pengurusan majlis dan telah dipersetujui secara kontraktual bahawa restoran itu akan dibuka kepada penduduk-penduduk kondominium itu dan juga orang awam. Sejurus selepas mengambil milikan premis tersebut dan menjalankan pengubahsuaian, responden memerlukan lesen perniagaannya diperbaharui dengan pihak berkuasa tempatan untuk tahun berikutnya yang mana surat sokongan daripada perayu diperlukan. Perayu, yang mana pada masa ini telahpun melalui perubahan pengurusan yang bertentangan dengan pajakan premis tersebut, enggan memberikan surat sokongan yang mengatakan bahawa perjanjian tersebut tidak mewajibkannya berbuat demikian. Berikutan itu, responden tidak dapat memperoleh lesen untuk menjalankan perniagaannya di premis tersebut dan ia dengan itu telah berhenti membayar sewa. Responden telah menyaman perayu di Mahkamah Tinggi untuk ganti rugi kerana pelanggaran perjanjian tersebut dan memohon perintah untuk pelaksanaan spesifik bagi mendesak perayu mengeluarkan surat sokongan kepadanya. Sebalikya, perayu, yang telah mengeluarkan kepada responden notis penamatan perjanjian tersebut, telah menuntut balas untuk milikan kosong premis tersebut dan untuk ganti rugi berasaskan kegagalan responden untuk membayar sewa. Mahkamah Tinggi telah membenarkan tuntutan responden untuk ganti rugi dan untuk pelaksanaan spesifik dan menolak tuntutan balas itu. Perayu telah merayu terhadap keseluruhan keputusan itu tetapi semasa perbicaraan rayuan tidak meneruskan dengan rayuannya terhadap penolakan tuntutan balasnya.

Diputuskan, menolak keseluruhan rayuan:

(1) Ketiadaan peruntukan spesifik yang menyatakan dengan nyata kuasa untuk menjual, memajak atau menyewa hartanah bersama dalam s 8(2) Akta tersebut tidak semestinya bermaksud JMB tidak mempunyai kuasa untuk berbuat demikian. Kuasa itu tidak perlu nyata dan ia boleh tersirat bahawa pajakan hartanah bersama oleh JMB boleh terangkum dalam skop s 8(2) Akta tersebut. Oleh kerana terdapat peruntukan am dalam s 8(2)(g) ('to do all things reasonably necessary for the performance of its duties under the Act'), mahkamah tidak melihat sebab atau asas untuk mengisytiharkan perjanjian untuk pajakan dalam kes ini sebagai terbatal dan tidak sah kerana diluar bidang Akta tersebut. Dengan mengiktiraf kuasa untuk menjual, menyewa atau memajak hartanah bersama adalah untuk membolehkan atau memudahkan JMB melaksanakan kewajipannya dengan melakukan perkara yang sewajarnya perlu. Kuasa tersirat itu menggalakkan keberkesanan perniagaan dalam penyeleggaraan dan pengurusan hartanah bersama (lihat perenggan 28 & 32).

(2) Mahkamah tidak bersetuju dengan perayu bahawa operasi s 8(2)(g)

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hanya berkaitan kepada perkara-perkara dalam pelaksanaan kewajipan oleh JMB di bawah s 8(2)(a) hingga (i). Itu agak ketat dan tegar untuk tafsiran. Jika, sebagaimana diperuntukkan dalam s 8(2)(d), JMB boleh membeli, menyewa atau memperoleh hartanah, mahkamah tidak melihat sebab kenapa JMB tidak boleh melakukan yang berikut dengan syarat, sememangnya, satu-satunya objektif adalah untuk faedah penduduk dan ahli JMB. Perayu-perayu sebagai JMB akan masih dapat mengurus dan menyelenggarakan premis tersebut melalui perjanjian tersebut (lihat perenggan 29 & 35).

(3) Salah satu kewajipan utama JMB di bawah s 8(1) Akta tersebut adalah untuk menjaga kebajikan ahli-ahlinya dalam menikmati hartanah bersama itu. Di bawah s 8(1)(i), perayu secara am diberi kuasa untuk membuat perkara lain yang wajar atau perlu bagi penyelenggaraan dan pengurusan bangunan. Walaupun dengan pajakan premis tersebut diberikan kepada responden, ahli-ahli perayu boleh menikmati bahagian sebahagian hartanah bersama itu. Ahli-ahli itu bukan hanya mendapat faedah penggunaan restoran tetapi juga sewaan daripada pajakan itu boleh digunakan untuk mengurangkan caj penyelenggaraan dan pengurusan yang kena dibayar oleh ahli-ahli perayu. Pajakan premis tersebut dengan itu dilakukan oleh JMB adalah suatu yang sewajarnya perlu bagi pelaksanaan kewajipannya di bawah Akta tersebut (lihat perenggan 31).

(4) Walaupun perjanjian tersebut dalam kes ini tidak didaftarkan di bawah Kanun Tanah Negara dan oleh itu tidak sah sebagai pajakan, ia masih baik dan sah sebagai perjanjian untuk pajakan dan boleh berkuat kuasa dalam ekuiti melalui dikri pelaksanaan spesifik (lihat pereggan 24(d)(iii)).

(5) Notis penamatan perayu dan tuntutan untuk milikan kosong dalam notis tersebut bukan notis penamatan perjanjian yang wajar dan sah. Tidak terdapat apa-apa pelanggaran yang dibuktikan atau pelanggaran yang dilakukan oleh responden sehingga 31 Disember 2012. Responden telah berhenti membayar sewa selepas itu kerana ia tidak dapat memperbaharui lesen perniagaannya untuk tahun 2013 sebab kegagalan perayu mengemukakan surat sokongan (lihat pereggan 24(c)(iii)).

(6) Perayu secara tersirat bersetuju di bawah perjanjian tersebut telah memberikan surat sokongan kepada responden untuk membolehkannya mendapat lesen perniagaannya untuk tahun 2013. Pihak-pihak kepada perjanjian perlu melakukan sedemikian sebagaimana diperlukan untuk mengekalkan integriti perjanjian dan untuk memastikan pelaksanaannya. Tiada sebab untuk perayu menahan daripada memberi surat sokongan itu jika tidak kerana niat menghalang responden daripada menjalankan perniagaannya di premis tersebut (lihat perenggan 24(b)(ii)(iv)).

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(7) Mantan pengerusi (SP2) dan setiausaha perayu (SP3) diberi kuasa penuh untuk berurusan dengan responden dan untuk memasuki perjanjian tersebut bagi pihak perayu. Peraturan pengurusan dalaman juga terpakai menyebelahi responden, yang merupakan orang luar, dan ia berhak untuk beranggapan bahawa semua perkara telah dilakukan dengan betul oleh perayu kerana responden telah bertindak dengan niat baik tanpa notis tentang apa-apa cabaran kepada kuasa SP2 dan SP3 (lihat perenggan 24(a)(iii)(f), (v)).]

Cases referred to

Bumiputra-Commerce Bank Bhd v Augusto Pompeo Romei & Anor [2014] 3 MLJ 672; [2014] AMEJ 0118, CA (refd)
Majlis Peguam Malaysia & Ors v Raja Segaran a/l Krishnan [2005] 1 MLJ 15; [2004] 4 CLJ 239, CA (refd)
Malaysia Shipyard And Engineering Sdn Bhd v Bank Kerjasama Rakyat Malaysia Bhd [1985] 2 MLJ 359; [1985] 2 CLJ 427, SC (refd)
Margaret Chua v Ho Swee Kiew & Ors [1961] 1 MLJ 173, CA (refd)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465; [1998] 1 CLJ 793, FC (refd)
Royal British Bank v Turquand (1856) 119 ER 474 (refd)

Legislation referred to

Building and Common Property (Maintenance and Management) Act 2007 ss 8(1), (2), (a), (b), (c), (d), (e), (f), (g), (h), (i), 11(1)
Companies Act 1965
Contracts Act 1950 s 66
National Land Code ss 43, 221, 433(B), Form 15A

Appeal from: Civil Suit No 22NCVC-20–01 of 2013 (High Court, Kuala Lumpur)

Tang Kim Choong (Mohammad Shafiee bin Afendi with him) (K C Tang & Co) for the appellant.
Azwan bin Abdul Wahab (Dzahara & Assoc) for the respondent.

Mah Weng Kwai JCA (delivering judgment of the court):

THE PARTIES

[1] The appellant is a joint management body ('JMB') incorporated under the Building and Common Property (Maintenance and Management) Act 2007 ('the Act') which came into force on 12 April 2007. The appellant maintains and manages, inter alia, the premises known as 'Tiara Duta Clubhouse and Restaurant and Car Parks' ('the premises') being common property in a condominium development known as Tiara Duta Condominium

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located at Persiaran Putra, Taman Putra Sulaiman, Ampang, Selangor ('the property'). A

[2] The appellant has appointed a joint management committee ('JMC') to perform its duties and conduct business on its behalf (s 11(1) of the Act). B

[3] To date, a management corporation has not been formed as less than 25% of the owners of the property have registered the transfer of the strata titles from the developer to themselves.

[4] The respondent is a company incorporated under the Companies Act 1965. C

THE AGREEMENTS

[5] On 18 July 2011, a written agreement ('the first agreement') (*rekod rayuan Jilid* 3 p 417) was entered into between the respondent and the appellant for the lease of the premises for a period of five years, with effect from 1 July 2011, with an option to renew for a further period of five years, at the rental of RM5,000 per month for the first five year period. D E

[6] On behalf of the appellant, the first agreement was signed by Hj M Isa bin Halihan ('SP2'), its former chairman and Hajah Haizan bt Abdul Rahman ('SP3') its former secretary. F

[7] The first agreement was signed by Syed Abd Rahman Syed Akil on behalf of the respondent.

[8] The first agreement was substituted by a second agreement dated 30 April 2012 (*rekod rayuan Jilid* 3 p 443) entered into between the same parties upon almost similar terms and conditions for a period of ten years with effect from 1 April 2012 and with an option to renew for another ten years. The rental was increased to RM9,000 per month for the first two years and thereafter with an increase of 10% annually from the third to the tenth year. G H

[9] For purposes of this appeal, references to 'agreement and/or lease' shall refer to the second agreement as being the agreement in issue, unless specifically referred to as the first agreement or second agreement. I

[10] Both the first and second agreements were not registered as a lease under Part 15 of the National Land Code.

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[11] It was an agreed term of the agreement that the restaurant would be open to the residents of Tiara Duta Condominium as well as to members of the public.

THE PROBLEM

[12] Prior to 1 April 2012 possession of the premises was handed over to the respondent by the appellant to enable the respondent to carry out renovation works before the commencement of business on 1 April 2012.

[13] In order to carry on the business, the respondent had applied for and obtained a *lesen perniagaan* from Majlis Perbandaran Ampang Jaya ('MPAJ') for year ending 31 December 2012.

[14] Sometime in November 2012, the respondent applied to MPAJ for a renewal of its *lesen perniagaan* for 2013. The respondent was informed by MPAJ to obtain a letter of support ('surat sokongan') from the appellant in respect of the agreement entered into between the appellant and the respondent. On 3 December 2012 the respondent wrote to the appellant requesting for the letter of support.

[15] The appellant declined to give the letter of support to the respondent on the ground that it was not obliged to do so under the terms and conditions of the agreement.

[16] In consequence, the respondent was not able to obtain its *lesen perniagaan* for 2013 and had to stop its business operations.

THE CLAIM AND COUNTERCLAIM

[17] The respondent's claim against the appellant was for breach of the agreement and prayed for an order of specific performance, with the appellant issuing a letter to MPAJ within 14 days from the date of judgment to support the respondent's application for a renewal of its *lesen perniagaan* and for damages.

[18] The appellant in turn counterclaimed for vacant possession of the premises and for damages to be assessed on the ground that the respondent had breached the terms of the agreement (as pleaded in para 11.1 to para 11.13 of the defence and counterclaim) and had defaulted in the payment of rental. The appellant had given notice of termination of the agreement to the respondent pursuant to cl 10.1(a) and (b) of the agreement (see *rekod rayuan Jld* 3 p 480).

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DECISION OF THE HIGH COURT

[19] After a full trial, the learned trial judge allowed the respondent's claim for an order of specific performance, general damages only and interest and dismissed the counterclaim. Costs of RM35,000 was ordered to be paid by the appellant in the claim and counterclaim.

APPEAL BY THE APPELLANT

[20] Being dissatisfied with the decision of the learned trial judge, the appellant filed its notice of appeal to the Court of Appeal against the order allowing the claim and the order dismissing the counterclaim.

HEARING OF THE APPEAL

[21] Upon reading the record of appeal, the written submissions of counsel for the appellant and the respondent and upon hearing the oral submissions of counsel aforesaid, the court on 31 October 2013, decided to reserve judgment and to deliver its decision on a date to be fixed.

DECISION OF THIS COURT

[22] After a careful consideration of the evidence and the several interesting points of law raised by counsel for appellant, the court is of the view that there are no merits in the appeal and accordingly the appeal is dismissed with costs.

GROUNDS OF DECISION

[23] The main thrust of the appellant counsel's submission was that the agreement was ultra vires the Act and therefore null and void as the appellant did not have the power to enter into the agreement to lease the premises to the respondent.

[24] But before we delve into and deal with the substantive arguments on this point of law, the following issues will also have to be determined by the court. They are namely:

(a) whether the agreement was validly signed by both the former chairman and secretary of the appellant;

(b) whether the appellant was obliged to give a letter of support to the respondent;

(c) whether the respondent was in breach of the agreement; and

(d) the effect of the agreement not being a registered lease.

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(a) Issue 1 — whether the first and second agreements were validly signed by both the former chairman and secretary of the appellant.

(i) the appellant's contention was that the former chairman Hj M Isa bin Halihan ('SP2') and the secretary Hajah Haizan bte Abdul Rahman ('SP3') were not clothed with the proper authority to have validly executed the first and second agreements on behalf of the appellant that is, they did not have the mandate of the appellant to do so.

(ii) from the circumstances of this case, it is apparent to the court that there are differences between the present chairman and his committee and SP2 and SP3 over the maintenance and management of the premises. It was the appellant's contention that as SP2 and SP3 were not mandated to sign the first and second agreements, they had done so wrongfully and on a frolic of their own and as such the agreements could not be binding on the appellant.

(iii) with respect, in our judgment we are of the view that there is absolutely no basis at all to support this argument. We say so for the following reasons:

(a) the respondent was a stranger to the appellant before 2011. It was only sometime in early 2011 that the respondent, in answer to an advertisement placed by the appellant, became interested in the premises and began business negotiations with the appellant.

(b) the first meeting of the JMC for 2011/2012 was held on 19 May 2011. At this meeting, the committee had discussed the issue of leasing the restaurant at the clubhouse to the respondent.

(c) At the second meeting of the JMC for 2011/2012 held on 13 July 11 attended by SP2, SP3 and five members including Melvin Cheah, the present chairman of the appellant, the minutes of the first meeting were confirmed and the decision to lease the restaurant at the clubhouse to the respondent was ratified. It is pertinent to set out verbatim what was ratified by the committee on 13 July 11. The minutes appearing in *rekod rayuan* (*Jilid* 3) at p 532 read:

(iv) The restaurant at the Club House is leased out to Time-Out Resources Sdn. Bhd. for a 5-year period commencing on 1st July 2011 with a renewal option of another 5 years;

(v) The company will operate a food court (sub-let basis) and restaurant at the demised premises, and will also offer event management services;

(vi) Rental for the first 24 months is RM5,000 per month with a 10% increment for every subsequent year. However, rental is waived for the first 2-month renovation period (1st July to 31 August 2011);

(vii) The operator will share its revenue with BPTD at the rate of 10% of net monthly profit or RM1,500 per month, whichever is higher; and

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(viii) The operator shall do its own renovation of the premises (in consultation with BPTD) and shall also provide its own cleaning service and security.

From the above, it will be noted that SP2 and SP3 were fully authorised to deal with the Respondent and to enter into the first and second agreements that they did on behalf of the appellant, albeit it is recognised that no resolution was passed by the appellant specifically for this purpose at the second meeting of the JMC. Further it would appear that no EGM was convened to authorise SP2 and SP3 to sign the first agreement.

It is entirely strange that Melvin Cheah and the others should now object to the agreements when in fact they were party to the decision taken on 13 July 2011 to lease out the premises. Further, there is nothing on record to show that the JMC was not agreeable to the lease as a whole or to any of the terms therein.

(d) following the ratification of the decision on 13 July 2011, SP2 and SP3 proceeded to sign the first agreement with the respondent on 18 July 2011, with the lease commencing on 1 July 2011. The minutes of the second meeting of the JMC and the first agreement are contemporaneous documents and there is nothing to suggest that either of them is improper or has been connived.

(e) it will be noted that the minutes of meeting referred to above are the minutes of meeting of the JMC and not of the appellant. However as the JMC had been appointed by the JMB to carry out its duties and functions, it is obvious that the appellant as the JMB and the principal had adopted and approved all that had been done by the JMC.

(f) in any event, the internal management rule must apply in the present circumstances. The respondent is a third party to the internal management of the appellant and was not put on notice at any time to inquire into the authority, or the lack of it, of SP2 and SP3 to enter into the agreements. Thus, it was not wrong for the respondent to assume that everything was in order and that it was proper for SP2 and SP3 to have signed the agreements.

(g) in *Royal British Bank v Turquand* [1856] 119 ER 474 it was held that 'persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed, and are not bound to inquire whether acts of internal management have been regular'.

The *Turquand*'s Rule would, in our view similarly apply to this case, even though the appellant is not a company incorporated under the Companies Act 1965.

(i) in the case of *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465; [1998] 1 CLJ 793 (FC), it was similarly held by Edgar Joseph Jr FCJ that:

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the effect of the Turquand Rule is that it reduces the enquiries which outsiders having dealings with a company must take. Such outsiders have no right to insist on proof by the company's directors that the provisions of its Memorandum & Articles have been complied with, and they cannot therefore be deemed to have constructive notice of some failure to comply which they have no means of discovering.

See also the recent decision of the Court of Appeal in *Bumiputra-Commerce Banks Bhd v Augusto Pompeo Romei & Anor* [2014] 3 MLJ 672; [2014] AMEJ 0118.

(ii) a crucial point to note in this case is that the respondent was not put upon inquiry on the want of authority on the part of SP2 and SP3. The respondent could therefore presume that things were rightly done within the appellant. The respondent, as an outsider, is entitled to enforce the agreement as it had acted in good faith and without notice that the authority was allegedly being abused.

(iii) the second agreement was in fact a 'replacement' of the first agreement upon the same terms and conditions, save for the duration of the lease and the increased monthly rental. The court's observations on the formation and existence of the first agreement would apply mutadis mutandis to the second agreement. Accordingly, the court is of the view that the second agreement was lawfully and properly entered into by SP2 and SP3 on behalf of the appellant on 30 April 2012. Importantly, we note that there were no minutes of meetings of the JMC nor any resolution passed tendered in evidence to show that SP2 and SP3 were no longer authorised to enter into the second agreement.

(iv) The only record of any objections to the leasing of the premises was in the minutes of the 4th Annual General Meeting of the appellant held on 9 September 2012 where in para 6.1 it was minuted as follows:

For record, the mandate of 'Tidak Bersetuju' was unanimously adopted against the past JMC management over the leasing of the Club House premises to TOR (Timeout Resources Sdn Bhd). JMC will have to study the two contracts signed previously and to be follow(ed) up with COB, to consult MPAJ and seek legal advice. TOR issue is considered as top priority.

(v) apart from the above, no decision was taken or resolution passed to authorise the new office bearers of the appellant and the JMC to withdraw from the second agreement and to terminate the same. It will be noted that the appellant's 4th AGM was held on 9 September 2012 ie some five months after the second agreement had been entered into and that the respondent was presumably regular in its payment of rentals to the appellant.

(b) Issue 2 — whether the appellant was obliged to give a letter of support to the respondent

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(i) for all intents and purposes the second agreement was a binding lease agreement between the appellant and the respondent.

(ii) although it is noted that there is no express provision in any of the terms of the agreements that the appellant was obliged to furnish a letter of support to the respondent to facilitate the respondent's application for a renewal of its *lesen perniagaan* for 2013, in our judgment we are of the view that at the very least, there was an implied obligation on the part of the appellant to do so. It is trite that parties to an agreement must do such acts as are necessary to preserve the integrity of the agreement and to ensure due performance of the agreement by all parties concerned. Here, it is not wholly unforeseeable that the refusal by the appellant to give its letter of support would delay and prejudice the respondent in its application. As events unfolded, the respondent was in fact unable to obtain a renewal of the license from MPAJ for 2013.

(iii) much was said by the appellant that there was no express or written request from MPAJ to the respondent or to the appellant for the latter's letter of support. We are of the view that nothing much turns on this, on whether there was a written request from MPAJ as it was in evidence that there were oral requests made by officers of MPAJ for the said letter.

(iv) in any event, the respondent themselves had most certainly requested in writing for the letter of support from the appellant, once on 18 July 2012 when the respondent's counsel wrote to the appellant and again on 3 December 2012 when the respondent wrote directly to Melvin Cheah, chairman of the appellant (see *rekod rayuan* p 476). There was no reason for the appellant to refrain from giving its letter of support if not for the singular intention to prevent the respondent from carrying on its lawful business at the premises in 2013. The appellant wanted the respondent out and the appellant saw it as a golden opportunity to force a termination of the agreement. Quite obviously, the respondent, without having its license to carry on business in 2013, would not be paying any rental to the appellant and it cannot be gainsaid then that the respondent was in breach of the agreement by failing to pay the rental as agreed.

(v) in any event it is a finding of the court that the requirement on the part of the appellant to furnish the letter of support to the respondent was a necessary corollary to the covenant undertaken by the respondent in cl 6.1 of the second agreement. Clause 6.1 of the second agreement compels the respondent to obey and comply with all laws and requirements of the local authority including obtaining the necessary business license for the clubhouse restaurant. It is thus implicit that the appellant must act in a manner to ensure the due performance of the contract by the respondent. It behoves the court to rule that the appellant was obliged to furnish the letter of support as the court should exercise its

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discretion to uphold conduct for the due performance of the contract rather than to cause its breach.

(c) Issue 3 — whether the respondent was in breach of the agreement

(i) the respondent was obviously serious in its commitment to carry on business at the premises from 1 March 2012 as it had invested large sums of money, of about RM2m, to renovate the premises. The renovations must have been carried out with the consent of the appellant as no action whatsoever was taken by anyone at any point in time to restrain the respondent from doing so.

(ii) vacant possession was duly given to the respondent and in fact a rent free period of two months was given to the respondent to carry out the renovations.

(iii) there does not seem to have been any proven breach or breaches committed by the respondent right up to 31 December 2012. The respondent had stopped paying rental to the appellant after it had failed to renew its *lesen perniagaan* for 2013 by reason of the appellant's failure to furnish the letter of support. Thus, the notice of termination dated 21 December 2012 by the appellant under clause 10.1(a) and (b) of the second agreement and the claim for vacant possession in the said notice was not a proper and valid notice of termination of the lease.

(d) Issue 4 — the effect of the agreement not being a registered lease

(i) counsel for the appellant in his written submission submitted that 'in essence the said agreement is a lease agreement in disguise'. With respect, we fail to understand exactly what learned counsel meant to say by this submission.

(ii) to the court, the agreement to let out the premises for the initial period of five years would come within the meaning of a lease in s 221 of the National Land Code, although the same was not registered. The lease was in favour of the respondent, a body capable of taking a lease within the meaning of s 43 and s 433(B) of the National Land Code.

(iii) a lease however, will only have legal effect upon the registration of an instrument in Form 15A of the National Land Code. An unregistered lease, although void as a lease and will not have the effect of vesting an interest in the lessee, is still good and valid as an agreement for a lease and is enforceable in equity by a decree of specific performance (see *Margaret Chua v Ho Swee Kiew & Ors* [1961] 1 MLJ 173 (CA))

(iv) thus, the court is of the view that the respondent was quite correct to pray for the enforcement of the agreement as an agreement for a lease by way of a decree of specific performance.

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THE APPELLANT'S MAIN ARGUMENT

[25] We now return to consider the main argument of the appellant that is, s 8(2) of the Act does not empower the appellant to enter into the agreement and therefore the agreement is null and void. Counsel for the appellant reiterated that the powers of the JMB under s 8(2) of the Act does not allow the appellant to enter into a lease agreement. While the duties of a JMB are set out in s 8(1) of the Act, the powers of a JMB are provided for in s 8(2). Section 8(2) of the Act reads as follows:

(a) to collect from the purchasers maintenance and management charges in proportion to the allocated share units of their respective parcels;

(b) to authorise expenditure for the carrying out of the maintenance and management of the common property;

(c) to recover from any purchaser any sum expended by the Body in respect of that parcel in complying with any such notices or orders as are referred to under paragraph 1(e);

(d) to purchase, hire or otherwise acquire movable or immovable property for use by the purchasers in connection with their enjoyment of the common property;

(e) to arrange and secure services of any person or agent to undertake the maintenance and management of the common property of the building;

(f) to make house rules for the proper maintenance and management of the common property of the building; and

(g) to do all things reasonably necessary for the performance of its duties under this Act.

[26] Counsel for the appellant contended that paras (a) to (f) do not grant the appellant the power to lease out the premises and that the appellant could not come within the scope of para (g) which is 'to do all things reasonably necessary for the performance of its duties under this Act' and accordingly the appellant does not have the power to enter into a lease of common property under the Act.

[27] The appellant contended that unlike s 8(2)(d) where there is express power to 'purchase, hire or otherwise acquire movable or unmovable property for use by the purchasers in connection with this enjoyment of the common property', there is no express power relating to the sale, leasing or renting out of common property.

[28] It is our considered view that the absence of any specific provision spelling out expressly the power to sell, lease or rent out common property in

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s 8(2) of the Act, does not necessarily mean that a JMB does not have the power to do so. The power need not be express and it can be implied that the leasing out of common property by a JMB can come within the ambit of s 8(2)(g).

[29] If, as is provided in s 8(2)(d), a JMB can purchase, hire or acquire property, the court sees no reason why a JMB cannot do the converse provided of course, the sole objective is for the benefit of residents and members of the JMB. In fact, in his speech and summary report at the appellant's 4th AGM held on 9 September 2012, the chairman of the JMC had reported that the appellant had purchased two shop lots from the developer and that the two units were used as the management office and store respectively.

[30] In our present case, the appellant saw it fit in 2011/2012 to lease the premises to the respondent. The restaurant was open to members of the public and to members of the JMB. As such there was no deprivation of use of the restaurant by members of the JMB. The members not only had the benefit of the use of the restaurant but the JMB was also able to collect rental of at least RM9000 per month from the respondent. The rentals collected would no doubt accrue for the benefit and enjoyment of the members of the JMB.

[31] It can be said that one of the main duties of a JMB as set out in s 8(1) of the Act, is to look after the welfare of its members in their enjoyment of the common property. And it can be seen in s 8(1)(i) of the Act that the appellant is generally authorised to do such other things as may be expedient or necessary for the proper maintenance and management of the buildings. Even with the lease of the premises granted to the respondent, members of the appellant were able to enjoy that part of the common property. Further, the rentals collected would no doubt be applied to reduce the maintenance and management charges due and payable by the members of the appellant. Thus, the leasing of the premises by the appellant was the doing of something reasonably necessary for the performance of its duties under the Act. The court is mindful of the fact that at the 4th AGM of the appellant, the house was unanimously opposed to the leasing of the clubhouse premises by the 'past JMC management'. However, it is unfortunate that no reasons or explanations were given in support of the objection to enable the court to evaluate whether the leasing of the premises was reasonably unnecessary.

[32] The court has no issue with the submission of counsel for the appellant that the appellant being a creation by statute, the powers and duties are as provided by the statute that created it (see *Majlis Peguam Malaysia & Ors v Raja Segaran a/l Krishnan* [2005] 1 MLJ 15; [2004] 4 CLJ 239). But as there is a general provision in s 8(2)(g) of the Act, the court sees no reason or basis to declare the agreement to lease out its common property null and void (see s 66 of the Contracts Act 1950) for being ultra vires the Act. Recognising the power

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to sell, rent or lease common property is to enable or facilitate a JMB from performing its duties by doing things which are reasonably necessary. The implied power is to promote business efficacy in the maintenance and management of the common property belonging to the appellant.

[33] It is not uncommon for a JMB or a management corporation to lease out parking bays (as was done in this case) to its own members on a monthly or yearly basis. These leases of parking bays provide valuable income to the JMB or management corporation. If we are to go by the strict interpretation of the appellant, then either no one gets to use the parking bays or that the parking bays can be used for free. Now, surely either of the above propositions does not make commercial sense and cannot be supported as being reasonable.

[34] The court is mindful of the principle in company law that where the governing statutory provisions do not expressly or impliedly authorise or permit a thing then it is taken to be prohibited not by virtue of any express or implied statutory prohibition but by the doctrine of ultra vires (see *Malaysia Shipyard And Engineering Sdn Bhd v Bank Kerjasama Rakyat Malaysia Bhd* [1985] 2 MLJ 359; [1985] 2 CLJ 427 (SC)).

[35] Counsel for the appellant vexes the position that as the leasing of the premises is not expressly or impliedly authorised in s 8(2) of the Act, then the agreement must be taken to the prohibited (see *Halsbury's Laws of England* (4th Ed), Vol 9 at para 1333). However, for reasons already stated above, the court is of the view that a JMB is impliedly authorised under s 8(2)(g) of the Act to enter into a lease agreement. With respect, the court does not agree with counsel for the appellant that the operation of s 8(2)(g) relates only to matters in the performance of duties by a JMB under s 8(2)(a)–(i), which would be too strict and rigid an interpretation. The appellant as the JMB would still be able to manage and maintain the premises through the agreement. It will be incumbent upon the appellant to supervise the terms of the agreement in order to 'manage and maintain' the premises properly.

CONCLUSION

[36] It will be noted that during the hearing of the appeal counsel for the appellant had only submitted against the order of the learned trial judge allowing the respondent's claim and did not pursue the appellant's appeal against the dismissal of the counterclaim.

[37] In the result the court hereby dismisses the whole of the appellant's appeal with costs.

Whole of appeal dismissed.

Reported by Ashok Kumar